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Nos. 14-449 and 14-450

In the Supreme Court of the United States

STATE OF KANSAS, PETITIONER

v.

JONATHAN D. CARR

STATE OF KANSAS, PETITIONER

v.

REGINALD DEXTER CARR, JR.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether respondents' Eighth Amendment rights were violated when the trial court declined to sever the sentencing proceedings at their capital trial and instead conducted a joint penalty proceeding.

2. Whether respondents' Eighth Amendment rights were violated because the judge did not affirmatively instruct the capital-sentencing jury that mitigating circumstances need not be proven beyond a reasonable doubt.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Eighth Amendment entitled respondents to reversal of their capital sentences because the trial court conducted a joint penalty proceeding, rather than granting a severance. The federal government prosecutes defendants jointly during the guilt and penalty phases of capital trials. Accordingly, the United States has a substantial interest in the resolution of that question. This case also presents the question whether the Supreme Court of Kansas erred by holding that the

Eighth Amendment required the trial judge to affirmatively instruct the sentencing jury that mitigating circumstances need not be proven beyond a reasonable doubt. The United States agrees with petitioner that the state court erred.[1] But because jury instructions in the federal system use distinct language,[2] the government does not further address that issue in this brief.

STATEMENT

1. Respondents Reginald Carr and Jonathan Carr committed an indescribably brutal crime spree of rapes, robberies, and violence in Wichita, Kansas, leaving five people dead.

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[1] The instructions at respondents' trial are naturally read to permit jurors to consider mitigating evidence unconstrained by any burden of proof—in accordance with the Kansas statutory framework upheld in *Kansas* v. *Marsh*, 548 U.S. 163, 176-177 (2006). No Eighth Amendment principle required a separate instruction to underscore what was already clear.

[2] Jurors in proceedings under the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, are expressly instructed on the FDPA's preponderance-of-the-evidence standard for mitigating circumstances. *E.g.*, 1-9A *Modern Fed. Jury Instructions—Criminal* ¶ 9A.02 (Matthew Bender); see 18 U.S.C. 3593(c). And jurors in capital court-martial proceedings are instructed to consider and weigh all mitigating "evidence"—regardless of whether any circumstance has been established by any burden of proof. Department of the Army, *Military Judges' Benchbook*, *Pamphlet 27-9*, at 1189 (2014) (model instruction stating that "all evidence in extenuation and mitigation" must be "balance[d] * * * against the aggravating circumstances"); see Court-Martial R. 1004(b)(6). Accordingly, even if the rationale of the Supreme Court of Kansas were valid, it would not imply that a separate instruction on the burden to prove mitigating evidence is required in court-martial proceedings.

The spree began on December 7, 2000, with the carjacking, beating, and robbery of Andrew Schreiber. In that crime, a man whom Schreiber identified as Reginald Carr, and a second man that Schreiber was unable to identify, carjacked Schreiber, assaulted him, and robbed him—forcing Schreiber at gunpoint to travel from ATM machine to ATM machine, making withdrawals from his bank account. 14-449 Pet. App. (Pet. App.) 92, 95-99.

Four days after that armed robbery, respondents committed an attack on Linda Ann Walenta that resulted in Walenta's death. Pet. App. 92. They followed Walenta as she drove home from her job as an orchestra cellist. One of the respondents then approached, persuading Walenta to roll down her car window by pretending to need help—only then revealing a gun. When Walenta tried to shift her car into reverse, the assailant shot Walenta three times, with one of the bullets severing her spinal cord. Walenta survived for a time, and she provided information that assisted in the identification of respondents as the perpetrators. Less than a month after the shooting, however, she died as a result of her injuries. *Id.* at 99-101.

Three days after the shooting of Walenta, respondents brutalized five total strangers over the course of a night, through crimes that included rape, sexual assault, and robbery, followed by execution-style shootings that left four dead. Pet. App. 92, 99-110. Armed with guns, respondents broke into the Wichita home where five people were staying—Aaron S., Brad H., and Jason B., who resided there; Holly G., who was Jason B.'s girlfriend; and Heather M., a friend of Aaron S. *Id.* at 101. After forcing the five friends to

strip naked and taking their ATM cards, respondents embarked on a series of vicious sexual assaults. *Id.* at 102-108. Respondents forced the women to engage in sex acts with each other while respondents watched. *Id.* at 103. They then forced each of the men to have sex with each woman—threatening and hitting the men, and ignoring cries of pain from the forced acts. *Id.* at 103-104. Afterward, one respondent drove the home's occupants—one by one—to ATM machines in order to withdraw their funds. The other respondent remained behind, where he raped the two women in the home—at one point jabbing an object into the back of Holly G. that she believed to be a gun. After the respondent who had been driving the home occupants to ATM machines returned to the home, he raped each of the women in turn. *Id.* at 104-108.

After these assaults, respondents drove the five home occupants, all naked or partially clothed, to a soccer field—with the men transported in a car trunk. Pet. App. 108-109. Respondents made each of the five kneel in the snowy field. *Id.* at 109-110, 112. They then shot each in the back of the head, in succession. *Id.* at 110. Four died. *Id.* at 112-113, 123-124. Holly G. survived, apparently because a hairclip deflected the bullet to her head, so that the bullet fractured her skull but did not enter her brain. *Id.* at 112. After respondents left, Holly G.—now naked, barefoot, and severely injured—ran more than a mile through snow and over barbed wire fences for help. *Id.* at 110-111. Meanwhile, respondents returned to the home and ransacked it. *Id.* at 113. In addition to stealing property, they shot and killed Holly G.'s dog—apparently after beating it with a golf club. *Id.* at 113, 124.

2. a. Respondents were charged with numerous crimes. In connection with the quadruple homicide and surrounding offenses, respondents were charged with capital murder, aggravated kidnapping, aggravated robbery, aggravated burglary, rape, and a number of other crimes. In connection with the carjacking of Schreiber, respondents were charged with kidnapping, aggravated robbery, aggravated battery, and criminal damage to property. Finally, in connection with Walenta's murder, respondents were charged with first-degree felony murder. Pet. App. 92. Before the start of trial, the court denied each respondent's request that his trial be severed from that of the other respondent. *Id.* at 188-195. Respondents then proceeded to a jury trial, at which Reginald Carr was convicted on all charges. *Id.* at 92-93. Jonathan Carr was convicted on all charges related to the quadruple homicide and the felony murder of Walenta, but acquitted of the charges related to the Schreiber carjacking. *Ibid.*

b. After the trial court denied respondents' renewed requests for severance, the court held a joint penalty-phase hearing before the same jury that had heard the guilt phase of respondents' trial. Pet. App. 472. The State contended that a capital sentence was justified for each respondent based on four statutory aggravating factors: (1) each respondent knowingly and purposely killed or created a risk of death to more than one person; (2) each respondent committed the crimes to receive money or something of value; (3) each respondent committed the crimes to prevent lawful arrest or prosecution; and (4) each respondent committed the crimes in an especially heinous, atrocious, or cruel manner. *Id.* at 447-448. The State

relied solely on the evidence presented during the guilt phase to support those aggravating factors, including the testimony of Holly G., the survivor of respondents' attempted quintuple execution. *Id.* at 447.

Respondents then presented mitigation cases that substantially overlapped. Reginald Carr, who presented his case first, called a number of witnesses who testified that respondents had dysfunctional upbringings and suffered childhood traumas. See, *e.g.*, 41-A 11/5/02 Tr. 36-120 (respondents' mother); 41-B 11/5/02 Tr. 64-90 (respondents' sister). Then each respondent presented expert testimony that he possessed risk factors for antisocial behavior due to his upbringing, background, and cognitive deficiencies. See, *e.g.*, 43-A 11/7/02 Tr. 17-87 (Reginald Carr); 45A 11/12/02 Tr. 4-145; 45B 11/12/02 Tr. 4-44 (Jonathan Carr). And each offered evidence that he had engaged in some positive conduct. See, *e.g.*, 42 11/6/02 Tr. 106-121, 165-175 (Reginald Carr); *id.* at 142-145, 148-150 (Jonathan Carr).

Each emphasized parallel themes in arguments to the jury. Reginald Carr's counsel principally recounted the evidence of Reginald Carr's troubled childhood, 46 11/13/02 Tr. 145-147, 151-164, and also pointed to the evidence that Reginald Carr displayed risk factors for criminal behavior, *id.* at 149-150, 157-158. After emphasizing that Reginald Carr had "done some good things in his life" as a father, *id.* at 162, he urged jurors to "extend mercy to" Reginald Carr, *id.* at 168-169.

Jonathan Carr's counsel presented similar arguments. He stated that in assessing mitigation, jurors "needed to know" about respondents' "bad family

life," 46 11/13/02 Tr. 172, about a "history of mental illness in the family," *id.* at 174, "evidence of mental illness in Jonathan," *id.* at 175, and evidence of brain injury, *id.* at 176-177. He added that jurors could also consider as mitigating evidence Jonathan Carr's "lack of a serious criminal record prior to these offenses," his young age, *id.* at 178, and his demeanor during trial, in which Jonathan Carr had "behaved himself," "treated [his counsel] like a gentleman," and—in the sole distinction that counsel drew between the two respondents in his argument—that Jonathan Carr had "come to court every day, unlike his brother," *id.* at 179. Finally, he invoked the testimony of three character witnesses as supporting the conclusion that "there is good in this young man." *Id.* at 179-180.

Prosecutors principally argued that respondents' mitigating evidence did not outweigh the aggravating factors in respondents' case. They emphasized the heinous nature of respondents' quadruple murder, the brutal sexual assaults respondents had inflicted on their victims, and respondents' efforts to cover up their crimes. 46 11/13/02 Tr. 183-184. Prosecutors argued that respondents' acts were the product of free choice, rejecting "[p]assing blame to Mommas and Daddies" and "society." *Id.* at 183; see *id.* at 182-184, 187-189. Emphasizing that respondents knew their actions were wrong, "ma[de] choices," and displayed "[n]o empathy for these people that were shot," *id.* at 190, prosecutors argued that while jurors were free to consider "mercy" and "sympathy" in mitigation, respondents "d[id] not deserve [the jury's] sympathy" or "mercy" in light of respondents' acts, *id.* at 194-195.

c. At the close of the penalty phase, the trial court instructed the jurors to "give separate consideration

to each defendant" because "[e]ach is entitled to have his sentence decided on the evidence and law which is applicable to him." Pet. App. 567 (Instruction No. 3).

The trial court next explained the standards guiding whether a death sentence was warranted in each individual case—making plain that jurors were constrained in the evidence they could treat as aggravating. The court explained that "[t]he State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist." Pet. App. 567 (Instruction No. 4). Separate instructions for each respondent then specified the circumstances that jurors could consider as aggravating, with each instruction cautioning that jurors could "consider only those aggravating circumstances set forth in this instruction." *Id.* at 569, 572; see *id.* at 568-569, 571-572.

Additional instructions for each respondent described possible mitigating circumstances. Those instructions listed six factors identified as mitigating by the Kansas legislature, and then stated that jurors could consider as mitigation "any other factor which you find may serve as a basis for imposing a sentence of less than death." Pet. App. 571, 574; see *id.* at 569-571, 573-574. Jurors were instructed that they could consider "sympathy for a defendant" and that "[t]he appropriateness of exercising mercy" could "itself be a mitigating factor." *Id.* at 573.

d. The jury unanimously found all of the aggravating factors with respect to each respondent. Further, after unanimously finding that these aggravating factors outweighed any mitigating factors, it returned a capital sentence for each respondent on each of the

four capital-murder counts. Pet. App. 93. The trial court imposed those sentences. The court also imposed a life sentence on each respondent for the felony murder of Walenta, as well as additional terms of imprisonment on the numerous other convictions. *Ibid.*

3. a. The Supreme Court of Kansas affirmed one capital conviction for each respondent, but ordered that respondents' capital sentences on those counts be vacated, concluding that the trial judge had violated each of respondents' Eighth Amendment rights by conducting a joint penalty-phase proceeding. Pet. App. 44, 50, 94, 530. The court began by stating that the Eighth Amendment "requires the jury to make an individualized sentencing determination" with respect to each capital defendant. *Id.* at 472. While disclaiming a holding that this requirement "categorically mandate[d]" the severance of capital-sentencing proceedings, the court concluded that each of the respondents had been deprived of the necessary individualized determination. *Ibid.*

In reaching this holding as to Reginald Carr, the Supreme Court of Kansas relied on aspects of Jonathan Carr's mitigation case that it saw as "antagonistic" to Reginald Carr. Pet. App. 473. The court identified occasions when Jonathan Carr invoked "mitigation evidence on behalf of J. Carr * * * to differentiate between his and R. Carr's levels of moral, not legal, culpability." *Ibid.* And it pointed to testimony elicited by Jonathan Carr from his sister, Temica Harding—whom Reginald Carr called as a witness—suggesting that Reginald Carr admitted to her that he

fired the shots in the quadruple homicides. *Id.* at 475.[3] The court suggested that Reginald Carr was deprived of an individualized sentencing determination because jurors might have treated the "antagonistic" evidence and argument as relevant to whether to find "mercy" as a mitigating factor in Reginald Carr's case and whether to reject a capital sentence for Reginald Carr on that ground. See *id.* at 474-476.

The Supreme Court of Kansas also suggested that this partially antagonistic evidence violated Reginald Carr's Eighth Amendment rights because jurors could have treated it "as improper, nonstatutory aggravating evidence against" Reginald Carr. Pet. App. 477. The court acknowledged that jurors would have violated the trial court's instructions if they used Jonathan Carr's evidence in this way. *Ibid.* Nevertheless, the court held that "this is a rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic." *Ibid.* This was the case, the court wrote, because "[i]n view of the defendants' joint upbringing in the maelstrom that was their family and their influence on and interactions with one another, including testimony that tended to show that R. Carr was a corrupting influence on J. Carr, the penalty phase evidence simply was not amenable to orderly separation and analysis." *Ibid.*; see

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[3] The Supreme Court of Kansas did not suggest that Temica Harding's statements were themselves inadmissible in Reginald Carr's sentencing. Pet. App. 475-476. Rather, it stated that it was "not satisfied that this testimony inevitably would have been admitted in a severed penalty phase" simply because the State might have been unaware of Reginald Carr's statements to Temica Harding. *Ibid.*

id. at 479 (citing "hopelessly tangled interrelationship of the mitigation cases").

In a much briefer separate opinion, the Supreme Court of Kansas concluded that Jonathan Carr was also denied individualized consideration, in violation of the Eighth Amendment, by the joint penalty-phase proceeding. Pet. App. 50. The court stated that Jonathan Carr was prejudiced "for reasons explained in * * * the R. Carr opinion and because of the family circumstances argument raised by J. Carr." *Id.* at 45. It added that it also "relie[d] on the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase."[4] *Ibid.*

Finally, the Supreme Court of Kansas concluded that the Eighth Amendment violation it found was not harmless as to either respondent. Pet. App. 478-480. In view of "[t]he evidence that was admitted," including Temica Harding's statements and the related mitigation cases, the court wrote that it could not "say that the death verdict was unattributable, at least in part" to the failure to sever that the court had found to be an Eighth Amendment violation. *Id.* at 479. The court accordingly ordered two new sentencing hearings, adding that the hearings should not be held before the same jury.[5] *Id.* at 478-480.

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[4] Reginald Carr was handcuffed during trial following behavior the trial court considered a security risk. See 171 10/17/02 Tr. 97-98. During the guilt phase, he wore a sweater that concealed the handcuffs from the jury's view. During the penalty phase, however, he declined to wear the sweater. Pet. App. 447; see 41-A 11/5/02 Tr. 7.

[5] The Supreme Court of Kansas found two additional constitutional violations had occurred in the sentencing proceeding. The court found an additional Eighth Amendment violation based on jury instructions that did not expressly tell jurors they could

b. Justice Moritz dissented from the Eighth Amendment holding, Pet. App. 551-563, "disagree[ing] with essentially every step of the majority's analysis," *id.* at 553. First, Justice Moritz rejected the majority's suggestion that Reginald Carr was deprived of an individualized sentencing determination because a "minor theme" in Jonathan Carr's mitigation case was "antagonistic" to Reginald Carr. *Id.* at 555. Justice Moritz explained that *Zafiro* v. *United States*, 506 U.S. 534, 538-539 (1993), undercut the proposition that any "antagonis[m]" deprived co-defendants of an individualized adjudication. Pet. App. 552. Justice Moritz noted that the majority cited no authority—and that she was aware of none—supporting its apparent contrary conclusion that because of "some antagonistic evidence pertaining to moral culpability, Reginald Carr's death sentence violates the Eighth Amendment's individualized sentencing requirement." *Id.* at 555. Justice Moritz found equally unsupported "the majority's implication that because" the State "*might* not have" elicited from Temica Harding that Reginald Carr had made statements implicating himself as the quadruple-homicide shooter, those statements' "admission in a joint trial somehow rose to the level of a constitutional violation." *Ibid.*

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consider mitigating factors not proven beyond a reasonable doubt—an omission the court concluded could have prevented the jury "from giving meaningful effect or a reasoned moral response to mitigating evidence." Pet. App. 512 (internal quotation marks omitted) (relying on *State* v. *Gleason*, 329 P.3d 1102 (Kan. 2014) (per curiam), cert. denied, 135 S. Ct. 1183, and cert. granted, 135 S. Ct. 1698 (2015)). The court also concluded that the use of certain evidence at sentencing had violated respondents' Confrontation Clause rights. *Id.* at 487-490.

At the next step, Justice Moritz concluded, the majority erred in finding that the jury might have improperly treated the "antagonistic" evidence as establishing nonstatutory aggravating factors, even though the jury was correctly instructed on the aggravating factors it could consider for each respondent. Pet. App. 556. Justice Moritz wrote that the majority's assertion that the case "present[s] the 'rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic,'" was unsupported, with the majority "oddly fail[ing] to explain the 'logic' to which that solid presumption gives way." *Ibid.* (citation omitted).

Finally, Justice Moritz "strongly disagree[d] with the majority's conclusory, one-paragraph harmless-error analysis." Pet. App. 557. She faulted the majority for failing to consider, as harmless-error analysis requires, "whether the court is able to find beyond a reasonable doubt that the error, *viewed in the light of the record as a whole*, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances." *Id.* at 557-558. She recounted the "overwhelming and convincing evidence of heinous and atrocious acts" the jury heard—particularly through the testimony of Holly G.—while noting it was "nearly impossible" to fully convey the horror of respondents' acts. *Id.* at 559-560. Had the majority performed the requisite harmless-error analysis, she wrote, "I do not believe it could arrive at any conclusion other than that the severance error, if any, had little, if any, likelihood of changing the jury's ultimate conclusion." *Id.* at 563.

SUMMARY OF ARGUMENT

The joint penalty phase of respondents' capital trial complied with the Eighth Amendment.

A. 1. Joint trials have been recognized as a fair means of adjudicating criminal cases, including capital cases, since the Founding Era. That history reflects that joint trials "serve the interests of justice," including accuracy, fairness, and efficiency. *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993). As to accuracy, joint trials enhance jurors' ability "to assign fairly the respective responsibilities of each defendant in sentencing" by providing "a more complete view" of the relevant acts "than would be possible in separate trials." *Buchanan* v. *Kentucky*, 483 U.S. 402, 418 (1987). As to fairness, joint trials "avoid[] the scandal and inequity of inconsistent verdicts" that can result from severed trials. *Zafiro*, 506 U.S. at 537. And as to efficiency, joint trials conserve public resources and spare victims the hardship of repeated trials. *Buchanan*, 483 U.S. at 417.

Critically, in upholding joint trials, this Court has rejected attacks on their general accuracy and fairness. It has explained that a defendant is not denied a fair and accurate adjudication simply because a co-defendant at a joint trial offers an "antagonistic" defense. *Zafiro*, 506 U.S. at 538. And it has explained that jurors can make reliable judgments about individual defendants in joint proceedings, even if jurors are exposed to evidence that is properly considered as to one defendant, but not as to others. *Id.* at 539. Trial judges may rely on limiting instructions to ensure that each defendant is judged based only on the evidence relevant and admissible as to him, in light of the "almost invariable" presumption that jurors follow

their instructions. *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987).

2. Neither the Eighth Amendment nor any other constitutional provision bars trial judges in capital cases from exercising their traditional discretion to conduct joint proceedings. The Eighth Amendment's baseline requirements are ones that Kansas's death-penalty statute satisfies: Capital-sentencing procedures must narrow the class of eligible offenders and permit jurors to consider any mitigating evidence. See *Kansas* v. *Marsh*, 548 U.S. 163, 175 (2006).

Beyond these requirements, capital-sentencing decisions, like all sentencing decisions, must be based on relevant evidence, not prejudicial and extraneous considerations. But this Court's joinder precedents establish that joint sentencing proceedings are compatible with this requirement in all but exceptional circumstances, as a result of the presumption that jurors will follow instructions concerning the evidence they may consider with respect to each defendant. This Court has consistently applied that presumption in capital cases.

Heightened constraints on joinder in capital-sentencing proceedings could undercut the aims of accuracy and fairness that are entitled to weight in the Eighth Amendment context. Because the presentation of additional evidence and argument enables jurors to obtain "a more complete view of all the acts underlying the charges than would be possible in separate trials," and "to assign fairly the respective responsibilities of each defendant," *Buchanan*, 483 U.S. at 418, joint trials often enhance jurors' ability to make accurate individualized judgments based on the "defendant's record, personal characteristics, and the

circumstances of his crime," *Marsh*, 548 U.S. at 174. In addition, because joint trials avoid the "scandal and inequity of inconsistent verdicts," *Richardson*, 481 U.S. at 210, they can help ensure that capital punishment is "not arbitrary or capricious in its imposition," *Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998).

B. The trial court did not deprive respondents of individualized sentencing determinations in violation of the Eighth Amendment or any other constitutional guarantee by holding a joint sentencing proceeding in this case. The aggravating and mitigating evidence pertaining to each respondent was essentially parallel. As a result, the joint proceeding afforded benefits of accuracy, fairness, and efficiency, but resulted in the presentation of little to no evidence that could be improperly considered as to either respondent.

This Court's precedents refute the Supreme Court of Kansas's suggestion that separate penalty proceedings were nonetheless constitutionally required because respondents' penalty-phase evidence diverged in some ways. The Kansas court principally suggested that Reginald Carr was entitled to a severance because, although respondents' defenses were largely parallel, Jonathan Carr offered some evidence that was "antagonistic" to Reginald Carr. This Court's cases, however, establish that a defendant is not deprived of a fair or accurate adjudication simply because a co-defendant offers some harmful evidence or argument at a joint trial. Nor was severance required because jurors might have treated Jonathan Carr's mitigating evidence "as improper, nonstatutory aggravating evidence" against Reginald Carr. Pet. App. 477. Jurors were correctly instructed on the aggravating factors they could consider, and they are "pre-

sumed to follow their instructions." *Zafiro*, 506 U.S. at 540.

Finally, the Supreme Court of Kansas was mistaken in holding that Jonathan Carr was deprived of an individualized sentencing determination by the joint proceedings. The court principally relied on the same reasons it had offered with respect to Reginald Carr. Those reasons were mistaken, but even if Reginald Carr could claim injury from Jonathan Carr's "antagonistic" evidence, Jonathan Carr could not claim injury from evidence he himself offered.

ARGUMENT

THE JOINT PENALTY PHASE OF RESPONDENTS' CAPITAL TRIAL COMPLIED WITH THE EIGHTH AMENDMENT

A. The Eighth Amendment Allows States To Give Trial Courts Wide Discretion To Conduct Joint Penalty Proceedings In Capital Trials

1. Joint trials have long been recognized as a fair means of adjudicating criminal cases, including cases involving capital offenses. This Court "repeatedly ha[s] approved of" joinder in an unbroken line of cases dating back to the Founding Era. *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993). First, in *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480 (1827), a capital case, Justice Story explained for the Court that a federal defendant had no right to a severance, relying in part on the absence of any historical support for such a right in common-law sources. *Id.* at 486 (concluding that "two or more persons" who "are jointly charged in the same indictment, * * * have not a right, by the laws of the country, to be tried severally, separately, and apart, the counsel for the United

States objecting thereto; but * * * such separate trial is a matter to be allowed in the discretion of the Court before whom the indictment is tried"). Since *Marchant*, courts have so frequently upheld joint trials that this Court has described the practice of joinder as "too well established to require further consideration," and has stated that "no question" exists that trial courts have the discretion to order joint trials. *Stilson* v. *United States*, 250 U.S. 583, 585-586 (1919); see *United States* v. *Ball*, 163 U.S. 662, 672 (1896) ("[T]he question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below."); see also *Buchanan* v. *Kentucky*, 483 U.S. 402, 416-420 (1987); *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

This unbroken practice reflects the principle that joint trials "serve the interests of justice." *Zafiro*, 506 U.S. at 537. First, this Court has explained, joint trials of those charged with the same offense generally enhance the accuracy of verdicts. By affording jurors "a more complete view of all the acts underlying the charges than would be possible in separate trials," they enhance jurors' ability "to assign fairly the respective responsibilities of each defendant in the sentencing" and at the guilt phase of a trial. *Buchanan*, 483 U.S. at 418; see *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987) (joint trials "serve the interests of justice by * * * enabling more accurate assessment of relative culpability"). Second, having a single jury consider the evidence pertaining to a single offense enhances fairness, "by avoiding the scandal and inequity of inconsistent verdicts" that can result from severed trials. *Zafiro*, 506 U.S. at 537 (citation omitted); see *Buchanan*, 483 U.S. at 418; *Richardson*, 481

U.S. at 210. Joint trials also avoid the unfairness of conferring a "random[]" strategic benefit on one defendant over another charged with precisely the same offenses—by allowing the later-tried defendant a free preview of the State's case. *Richardson*, 481 U.S. at 210. Finally, substantial societal interests counsel against the needless duplication of resources that occurs when separate trials for the same acts force the State to "present[] the same evidence again and again." *Ibid.*; see *Buchanan*, 483 U.S. at 417. They include not only the public's interest in conservation of state resources, but also the interests of victims and witnesses, who may be forced in severed trials to repeatedly relive horrific crimes. See *Richardson*, 481 U.S. at 210 (noting that forcing victims and others to repeatedly testify may result not simply in "inconvenience" but "trauma").

These benefits make it unsurprising that federal and state authorities have adopted rules preferring joinder in both capital and non-capital cases. The federal rules express a "preference * * * for joint trials of defendants who are indicted together," with severance appropriate "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 537, 539; see Fed. R. Crim. P. 8, 14. Consistent with historic practice, see *Marchant*, 25 U.S. (12 Wheat.) at 486, the decision whether to address a risk of prejudice through severance, a limiting instruction, or another remedy is left "to the sound discretion of the district courts," *Zafiro*, 506 U.S. at 541. Applying that framework, federal district courts regularly conduct joint sentencing hearings

when two defendants are charged with the same capital offense.[6] States that authorize capital punishment largely also follow liberal joinder rules, and rarely provide under state law that capital proceedings should receive different treatment.[7]

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[6] Joint penalty-phase proceedings for multiple defendants have been held in 19 capital trials since 2000, as set forth in Appendix A to this brief. The government has identified 16 capital trials during that time in which district courts exercised their discretion to grant a severance of capital defendants at either the guilt or penalty phase, as set forth in Appendix B to this brief. Courts of appeals have uniformly upheld district court decisions denying severance of joint penalty proceedings. See *United States* v. *Snarr*, 704 F.3d 368, 395-398 (5th Cir. 2013), cert. denied, 134 S. Ct. 1273, and 134 S. Ct. 1274 (2014); *United States* v. *Bernard*, 299 F.3d 467, 475-476 (5th Cir. 2002), cert. denied, 539 U.S. 928 (2003); *United States* v. *Tipton*, 90 F.3d 861, 892-893 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997); see also *Puiatti* v. *McNeil*, 626 F.3d 1283, 1309-1318 (11th Cir. 2010), cert. denied, 131 S. Ct. 3068 (2011).

[7] See Ala Ct. R. Crim. P. 13.4(a) (2014); Ariz. Ct. R. Crim. P. 13.4(a) (2014); Ark. Ct. R. Crim. P. 22.3 (2014); Cal. Penal Code § 1098 (West 2004): Colo. Ct. R. Crim. P. 14 (2015); Del. Super. Ct. R. Crim. P. 14 (2014); Fla. R. Crim. P. 3.152 (2007); Idaho Ct. Crim. R. 14 (2014); Ind. Code Ann. § 35-34-1-11 (LexisNexis 2012); Ky. Ct. R. Crim. P. 8.31 (2015); La. Code Crim. Proc. Ann. art. 704 (2003); Mo. R. Crim. P. 24.06 (2002); Mont. Code Ann. § 46-13-211 (2013); Nev. Rev. Stat. Ann. § 174.165 (LexisNexis 2011); N.C. Gen. Stat. § 15A-927 (2013); Or. Rev. Stat. § 136.060 (2013); Pa. Ct. R. Crim. P. 583 (2015); S.D. Codified Laws § 23A-11-2 (2004); Tenn. Ct. R. Crim. P. 14 (2014); Tex. Code Crim. Proc. Ann. art 36.09 (West 2007); Va. Code Ann. § 19.2-262.1 (2008); Wash. Super. Ct. Crim. R. 4.4 (2014): Wyo. Ct. R. Crim. P. 14 (2014). In contrast, two States require as a matter of state law that courts grant defendants' requests for severance in capital proceedings, Ga. Code Ann. § 17-8-4 (2013); *Smith* v. *State*, 729 So. 2d 1191, 1202-1203 (Miss. 1998) (en banc), cert. denied, 527 U.S. 1043 (1999), and a third State provides that capital defendants should generally be tried separately, Ohio Rev. Code Ann. § 2945.20 (LexisNexis 2014);

Critically, this Court has rejected claims that joinder, as a general matter, impedes the fairness or accuracy of joint proceedings. In *Zafiro*, it turned back the claim of defendants who argued they would not receive fair trials in joint proceedings because each of their defenses would be harmed by evidence or argument presented in "antagonistic" defenses of their co-defendants. 506 U.S. at 536-537. This Court agreed that under the federal rules, "a district court should grant a severance" if a "serious risk" exists that joinder would "prevent the jury from making a reliable judgment about guilt or innocence" or would compromise any other "specific trial right." *Id.* at 539. But it rejected any claim that "[m]utually antagonistic defenses" in themselves violate a fair-trial right. *Id.* at 538. On the contrary, in keeping with cases that have recognized that joint trials enhance accuracy by placing additional information before a jury, see, *e.g.*, *Buchanan*, 483 U.S. at 418, the Court explained that a defendant suffers no cognizable harm simply because a co-defendant places before the jury admissible facts or argument relevant to the jury's determination. While a fair trial requires "that a jury consider *only* relevant and competent evidence bearing on the issue of guilt or innocence," it does not "include the right to exclude relevant and competent evidence." *Zafiro*, 506 U.S. at 540 (citation omitted).

Equally critically, this Court rejected the argument that jurors will be prevented "from making a reliable judgment about guilt or innocence," *Zafiro*, 506 U.S. at 539, if they hear evidence in a joint trial that is properly considered only as to one of several defend-

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State v. *Coleman*, 544 N.E.2d 622, 629 (Ohio 1989), cert. denied, 493 U.S. 1051 (1990).

ants. The Court acknowledged that if the jury impermissibly considered such evidence as to a second defendant, it would compromise that defendant's right to accurate jury determinations based on the evidence admissible against him. *Ibid.* (explaining that risk of prejudice "might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant," such as "[e]vidence that is probative of a defendant's guilt but technically admissible only against a codefendant"). But it explained that trial courts have "less drastic" remedies than severance available to address the risk of such prejudice, including limiting instructions to the jury. *Ibid.* The Court wrote that a trial court, in its "sound discretion," was more likely to choose a severance remedy than a limiting instruction "[w]hen the risk of prejudice is high," but that limiting instructions "often will suffice to cure any risk of prejudice." *Ibid.*; see *id.* at 540 ("[J]uries are presumed to follow their instructions.") (citation omitted).

A century of cases bolster *Zafiro*'s recognition that trial courts may, in their discretion, properly rely on limiting instructions to ensure that each defendant in a joint proceeding is judged based only on the evidence relevant and admissible as to him. This Court has treated instructions as sufficient for that purpose since as early as 1896, *Ball*, 163 U.S. at 672, and has rejected attacks on the adequacy of such instructions, explaining that "[o]ur theory of trial rests upon the ability of a jury to follow instructions," *Opper*, 348 U.S. at 95. Indeed, this presumption is "almost invariable," applying in "many varying contexts" throughout the criminal law. *Richardson*, 481 U.S. at 206.

While this Court has recognized exceptions for limited classes of evidence so "powerfully incriminating" that a jury could not be expected to set the evidence aside, *Bruton* v. *United States*, 391 U.S. 123, 135 (1968), these are "narrow," leaving the presumption in place even when it requires jurors to disregard evidence that is very incriminating, *Richardson*, 481 U.S. at 207; see *id.* at 206-207 (cataloging examples).

2. The accuracy and fairness benefits of joint proceedings apply equally in the capital context. And nothing in the Eighth Amendment or any other constitutional provision bars trial courts from generally exercising discretion to conduct joint proceedings in capital cases—as courts have done since the Founding Era, see *Marchant*, 25 U.S. (12 Wheat.) at 486.

The Eighth Amendment imposes two principal restraints on capital sentencing, beyond which legislatures have flexibility in determining the appropriate procedures for adjudicating capital offenses. See, *e.g.*, *Kansas* v. *Marsh*, 548 U.S. 163, 173-175 (2006) (noting legislatures' flexibility). First, to ensure that the administration of the death penalty is not arbitrary, the sentencer must be guided by limiting criteria that "genuinely narrow the class of persons eligible for the death penalty and * * * reasonably justify the imposition of a more severe sentence." *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983). Second, because a death sentence must reflect a "reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime," the Eighth Amendment requires defendants to be able to submit, and sentencers to consider, mitigation evidence. *Marsh*, 548 U.S. at 174. Specifically, the Eighth Amendment

"require[s] that the sentencer not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Ibid.* (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.)). This Court has held that the Kansas death-penalty statute satisfies these constitutional requirements. *Id.* at 175.

Capital-sentencing decisions, like all sentencing decisions, must be based on relevant evidence, not on prejudicial and extraneous considerations that are not properly used by the sentencer against a particular defendant.[8] But this Court's joinder precedents establish that joint sentencing proceedings are compatible with this requirement in all but exceptional circumstances. It is possible that in a joint sentencing proceeding, like a joint trial, jurors may hear evidence relevant to one defendant that is not appropriately considered in making an individualized sentencing

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[8] The view of the Supreme Court of Kansas that this principle follows from the Eighth Amendment's individualized-consideration requirement is open to question. This Court's cases treat the individualized-consideration requirement as an *inclusionary* principle, not an *exclusionary* one. See, *e.g.*, *Marsh*, 548 U.S. at 175-176 (explaining that the Kansas capital-sentencing statute fully complied with individualized-consideration requirement because it provided that jurors may "consider *any* evidence relating to *any* mitigating circumstance in determining the appropriate sentence for a capital defendant, so long as that evidence is relevant"). This Court has indicated, however, that the introduction of irrelevant evidence in a capital-sentencing proceeding would violate the Due Process Clause if the evidence's introduction "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Romano* v. *Oklahoma*, 512 U.S. 1, 12 (1994).

determination with respect to another. But trial courts may instruct jurors on the evidence that can be considered with respect to each defendant, and juries are presumed to follow these instructions. See *Zafiro*, 506 U.S. at 539-541. Accordingly, absent unusual circumstances, a joint proceeding will not interfere with a defendant's right to individualized sentencing determination based on his own "record, personal characteristics, and the circumstances of his crime." *Marsh*, 548 U.S. at 174.

Nothing about the capital context renders *Zafiro*'s reasoning inapplicable. This Court has treated the presumption that jurors follow their instructions as applicable "in all cases," *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838, 841 (2009) (per curiam)—including capital cases, see, *e.g.*, *Blueford* v. *Arkansas*, 132 S. Ct. 2044, 2051 (2012); *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000); *Jones* v. *United States*, 527 U.S. 373, 394 (1999); *Romano* v. *Oklahoma*, 512 U.S. 1, 13 (1994). As the Court has explained, "[j]urors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions." *Hensley*, 556 U.S. at 841. The only exceptions have been "narrow" ones involving evidence so vividly and directly inculpatory that jurors simply could not be expected to follow an instruction to set the evidence aside. *Richardson*, 481 U.S. at 207-208 (describing the exception in *Bruton*, 391 U.S. at 135-136, for the "powerfully incriminatory" confession of one defendant that implicates a co-defendant at a joint trial). Because jurors presumptively follow their instructions in capital and non-capital cases alike, severance is not required in capital cases to

ensure that defendants receive appropriate individualized consideration.

Indeed, heightened constraints on joinder in the capital context could undercut objectives of accuracy and fairness entitled to weight under the Eighth Amendment. The Eighth Amendment's individualized sentencing objectives are served by rules permitting "the jury to have as much information before it as possible when it makes the sentencing decision," and to hear "open and far-ranging argument." *Gregg* v. *Georgia*, 428 U.S. 153, 203-204 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Because the presentation of additional argument in joint sentencing proceedings enables jurors to obtain "a more complete view of all the acts underlying the charges than would be possible in separate trials" and "to assign fairly the respective responsibilities of each defendant," *Buchanan*, 483 U.S. at 418, joint trials will often *enhance* jurors' ability to make accurate and reasoned judgments as to individual defendants based on evidence of the "defendant's record, personal characteristics, and the circumstances of his crime," *Marsh*, 548 U.S. at 174.

Second, heightened constraints on joinder in the capital context would risk undercutting the Eighth Amendment's objective of avoiding arbitrarily different treatment of similarly situated capital defendants. See *Gregg*, 428 U.S. at 188 (opinion of Stewart, Powell, and Stevens, JJ.) (explaining Court's rejection of highly discretionary scheme because it was impermissible for the death penalty to be imposed "wantonly" and "freakishly" on some defendants, while it was not imposed on others "just as reprehensible") (quoting *Furman* v. *Georgia*, 408 U.S. 238, 309-310 (1972) (Stewart,

J., concurring)); *Buchanan* v. *Angelone*, 522 U.S. 269, 275-276 (1998) (describing safeguards Court has required to ensure that capital punishment is "not arbitrary or capricious in its imposition"). As this Court has explained, joint trials are themselves a means of protecting against arbitrarily inconsistent treatment of similarly situated defendants. *Richardson*, 481 U.S. at 210. By enabling a single sentencer to consider the evidence against multiple participants in a single capital crime, joinder helps ensure that those participants are not treated differently for reasons wholly unrelated to their conduct or character—simply because separate fact-finders place greater or lesser weight on shared aggravating factors or jointly applicable evidence in mitigation. The Eighth Amendment does not forbid legislatures from allowing trial judges wide discretion in capital cases to order joint proceedings.

B. The Trial Court's Decision To Conduct A Joint Penalty Proceeding Did Not Violate Respondents' Eighth Amendment Rights

The trial court did not deprive respondents of individualized sentencing determinations in violation of the Eighth Amendment or any other constitutional guarantee by holding a joint sentencing proceeding in this case. Since the aggravating and mitigating evidence pertaining to each respondent was largely parallel, the court's decision to conduct joint proceedings afforded benefits of accuracy, fairness, and efficiency, but resulted in presentation of little to no evidence that could be improperly considered as to either respondent. As aggravation, the State relied solely on trial evidence equally relevant to each respondent—evidence of the heinous murders, rapes, sexual as-

saults, and robberies that respondents committed together. And in mitigation, respondents presented arguments that were largely complementary. Each respondent emphasized the hardships of respondents' joint upbringing. And each obtained expert testimony to suggest that factors beyond their control—family background, psychological impairments, and other circumstances—placed them at risk for committing criminal acts. These parallel cases present paradigmatic circumstances in which joinder enhances fairness, accuracy, and efficiency. A joint penalty proceeding avoided arbitrariness from different juries assigning different weights to common evidence; provided jurors with a fuller picture of the common family and childhood circumstances on which each respondent relied; and spared the public and the State's witnesses the need to repeat—before a newly empaneled second sentencing jury—evidence already presented at a lengthy trial.

This Court's precedents refute the Supreme Court of Kansas's suggestion that the ways in which respondents' penalty-phase evidence diverged required the trial court to forgo the benefits of a joint penalty proceeding. With respect to Reginald Carr, the Kansas court principally suggested that severance was constitutionally required because Jonathan Carr offered some relevant evidence that was "antagonistic" to the mitigation case of Reginald Carr, Pet. App. 472-477, even though "most of the two brothers' mitigating evidence was not antagonistic," *id.* at 555 (Moritz, J., concurring in part and dissenting in part). But because "[m]utually antagonistic defenses are not prejudicial *per se*," *Zafiro*, 506 U.S. at 538, a defendant is not deprived of a fair trial simply because of some

antagonism between co-defendants' cases. A co-defendant's additional relevant evidence placed before the jury, this Court has explained, simply does not undermine the fairness of the other defendant's trial. See *id.* at 540 (noting that "a fair trial does not include the right to exclude relevant and competent evidence").[9]

The Supreme Court of Kansas erred equally in concluding that Reginald Carr was deprived of an individualized sentencing determination because jurors might have treated mitigating evidence offered by Jonathan Carr "as improper, nonstatutory aggravating evidence against" Reginald Carr. Pet. App. 477. That speculation was error, because jurors are

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[9] The Supreme Court of Kansas treated the "antagonistic" evidence in this case as prejudicial to Reginald Carr precisely because the evidence would have been relevant, at a minimum, to jurors' determination of whether to find as a mitigating factor that Reginald Carr was deserving of mercy. Pet. App. 472-476. But evidence that differentiates "the *moral* culpability of two defendants * * * in a joint trial" and that may determine "whether a juror decides to show mercy to one while refusing to show mercy to the other," *id.* at 474-475 (citing *State* v. *Kleypas*, 40 P.3d 139, 281 (Kan. 2001) (per curiam), cert. denied, 537 U.S. 834 (2002)), creates no constitutional concern. Indeed, so long as it is admissible, such evidence improves the fairness and accuracy of the proceedings by enhancing a jury's ability to make a reasoned and consistent moral judgment. And the court did not suggest that "antagonistic" statements elicited by Jonathan Carr would have been barred by any other evidentiary rule applicable to Kansas capital sentencings. See Kan. Stat. Ann. § 21-6617(c) (Supp. 2013) (during penalty phase, "[a]ny * * * evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence"). In any event, given the relatively small role of these statements in the overall conduct of the hearing, on no analysis can they be said to have "infected the sentencing proceeding with unfairness." *Romano*, 512 U.S. at 12.

properly presumed to have followed the trial court's instructions on the exclusive list of factors that could be considered as aggravation. *Zafiro*, 506 U.S. at 540; see Pet. App. 568-569 (listing aggravating factors and specifying that "[i]n your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction"). Indeed, this Court has previously applied the presumption that jurors are presumed to follow their instruction in an analogous case, where it reasoned that because jurors had been instructed that they could only consider particular circumstances as aggravating, jurors would not have used evidence unrelated to those factors as improper aggravation. *Romano*, 512 U.S. at 13. The Supreme Court of Kansas offered no evidence in this case sufficient to displace the "almost invariable" principle that jurors follow their instructions. *Richardson*, 481 U.S. at 206. The court cited the interrelated nature of respondents' mitigation evidence concerning their "joint upbringing in the maelstrom that was their family and their influence on and interactions with one another." Pet. App. 477. But there is no reason why overlap between respondents' mitigation evidence would have prevented jurors from treating as aggravating only the distinct facets of respondents' crimes that were enumerated in the jury instructions.

The Supreme Court of Kansas likewise erred in concluding that joint proceedings deprived Jonathan Carr of an individualized sentencing determination. The court principally wrote that it found a violation of Jonathan Carr's right to an individualized sentencing determination "for reasons explained in * * * the R. Carr opinion." Pet. App. 45. But as noted above, the

court's reasoning in Reginald Carr's case was incorrect. And even if the court had been correct that Reginald Carr was unfairly prejudiced by Jonathan Carr's introduction of "antagonistic" evidence, that would not establish unfair prejudice to Jonathan Carr, who *offered* the antagonistic evidence.[10]

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted.

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[10] The Supreme Court of Kansas added that it also "relie[d] on the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase." Pet. App. 45. But while visible shackles can "impl[y] to a jury, as a matter of common sense, that court authorities consider" the shackled defendant to be "a danger to the community," *Deck* v. *Missouri*, 544 U.S. 622, 633 (2005), visible shackles on one defendant do not naturally imply that court authorities considered an *unshackled* co-defendant to be a danger. On the contrary, the contrasting treatment more naturally suggests that authorities did not regard the unshackled defendant as a danger. Cf. 46 11/13/02 Tr. 179 (Jonathan Carr's counsel drawing attention to contrast between brothers' courtroom conduct, asking jurors to consider in mitigation that Jonathan Carr had "behaved himself" and had "come to court every day, unlike his brother").

APPENDIX A

Federal Capital Trials Involving Joint Penalty-Phase Proceedings

1. *United States* v. *Coonce*, No. 10-CR-03029 (W.D. Mo. 2014) (Wesley Paul Coonce, Jr. and Charles Michael Hall);

2. *United States* v. *Salad*, No. 11-CR-00034 (E.D. Va. 2012) (Ahmed Muse Salad, Abukar Osman Beyle, and Shani Nurani Shiekh Abrar);

3. *United States* v. *Snarr*, No. 09-CR-00015 (E.D. Tex. 2009) (Mark Isaac Snarr and Edgar Baltazar Garcia);

4. *United States* v. *Mills*, No. 02-CR-00938 (C.D. Cal. 2007) (Wayne Bridgewater and Henry Michael Houston);

5. *United States* v. *Dinkins*, No. 06-CR-00309 (D. Md. 2009) (James Dinkins and Melvin Gilbert);

6. *United States* v. *Varela*, No. 06-CR-80171 (S.D. Fla. 2009) (Ricardo Sanchez, Jr. and Daniel Troya);

7. *United States* v. *Lecco*, No. 05-CR-00107 (S.D. W. Va. 2007) (George M. Lecco and Valerie Friend);

8. *United States* v. *Mikhel*, No. 02-CR-00220 (C.D. Cal. 2007) (Iouri Mikhel and Jurijus Kadamovas);

9. *United States* v. *Mills*, No. 02-CR-00938 (C.D. Cal. 2006) (Barry Byron Mills and T.D. Bingham);

10. *United States* v. *Williams*, No. 01-CR-00512 (E.D. Pa. 2006) (Vincent Williams, Jamain Williams, and Andre Cooper);

11. *United States* v. *James*, No. 02-CR-00778 (E.D.N.Y. 2005) (Richard James and Ronald Mallay);

12. *United States* v. *Rivera*, No. 04-CR-00283 (E.D. Va. 2005) (Oscar Antonio Grande and Ismael Juarez Cisneros);

13. *United States* v. *Williams*, No. 00-CR-01008 (S.D.N.Y. 2005) (Elijah Bobby Williams and Reverend Michael Williams);

14. *United States* v. *Quinones*, No. 00-CR-00761 (S.D.N.Y. 2004) (Alan Quinones and Diego B. Rodriguez);

15. *United States* v. *Breeden*, No. 03-CR-00013 (W.D. Va. 2004) (Shawn Arnette Breeden and Michael Anthony Carpenter);

16. *United States* v. *Foster*, No. 02-CR-00410 (D. Md. 2004) (Keon Moses and Michael Lafayette Taylor);

17. *United States* v. *Matthews*, No. 00-CR-00269 (N.D.N.Y. 2003) (Lavin Matthews and Tebiah Shelah Tucker);

18. *United States* v. *Gray*, No. 00-CR-00157 (D.D.C. 2003) (Kevin L. Gray and Rodney L. Moore);

19. *United States* v. *Vialva*, No. 99-CR-00070 (W.D. Tex. 2000) (Christopher Andre Vialva and Brandon Bernard).

APPENDIX B

Federal Capital Trials Involving Severed Guilt- Or Penalty-Phase Proceedings

1. *United States* v. *Lewis*, No. 07-CR-00550 (E.D. Pa. 2013) (Steven Northington and Kaboni Savage);

2. *United States* v. *Eye*, No. 05-CR-00344 (W.D. Mo. 2008) (Gary Eye and Steven Sandstrom);

3. *United States* v. *Sablan*, No. 00-CR-00531 (D. Colo. 2006) (William Concepcion Sablan and Rudy Cabrera Sablan);

4. *United States* v. *Caraballo*, No. 01-CR-01367 (E.D.N.Y. 2005) (Gilberto Caraballo and Martin Aguilar);

5. *United States* v. *Johnson*, No. 04-CR-00017 (E.D. La. 2005) (John Johnson and Herbert Jones, Jr.);

6. *United States* v. *Catalan-Roman*, No. 02-CR-00117 (D.P.R. 2005) (Lorenzo Vladimir Catalan-Roman and Hernardo Medina-Villegas);

7. *United States* v. *Payne*, No. 98-CR-00038 (M.D. Tenn. 2004) (Eben Payne, Jamal Shakir, and Donnell Young);

8. *United States* v. *Fulks*, No. 02-CR-00992 (D.S.C. 2004) (Chadrick E. Fulks and Branden L. Basham);

9. *United States* v. *Perez*, No. 02-CR-00007 (D. Conn. 2004) (Wilfredo Perez and Fausto Gonzalez);

10. *United States* v. *Ostrander*, No. 01-CR-00218 (W.D. Mich. 2003) (Robert Norman Ostrander and Michael Paul Ostrander);

11. *United States* v. *Taylor*, No. 01-cr-00073 (N.D. Ind. 2003) (Styles Taylor and Keon Thomas);

12. *United States* v. *Hyles*, No. 01-CR-00073 (E.D. Mo. 2003) (Tyrese D. Hyles and Amesheo D. Cannon);

13. *United States* v. *Henderson*, No. 00-CR-00260 (N.D. Tex. 2002) (Julius Omar Robinson and L.J. Britt);

14. *United States* v. *Cooper*, No. 01-CR-00008 (S.D. Miss. 2002) (Billy D. Cooper and James Edward Frye);

15. *United States* v. *Hage*, No. 98-CR-01023 (S.D.N.Y. 2001) (Mohamed Rashed Daoud Al-'Owhali and Khalfan Khamis Mohamed);

16. *United States* v. *Church*, No. 00-CR-00104 (W.D. Va. 2001) (Walter Lefight Church and Samuel Stephen Ealy).